IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Clay E. Reed, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080410-CA F I L E D (April 15, 2010) 2010 UT App 88

Eighth District, Roosevelt Department, 071000347
The Honorable A. Lynn Payne

Attorneys: Michael L. Humiston, Vernal, for Appellant
Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake City, for Appellee

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Before Judges Davis, McHugh, and Thorne.

DAVIS, Presiding Judge:

Clay E. Reed appeals from a conviction for possession or use of a firearm by a restricted person, see Utah Code Ann. § 76-10-503 (2008), arguing two points of error in the proceedings below. We affirm.

Reed first contends that trial counsel rendered ineffective assistance by failing to act on several pretrial discovery motions after filing them and for failing to call a "critical exculpatory witness," Megen Bell, to bolster his claim that he did not have a gun. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law," State v. Perry, 2009 UT App 51, ¶ 9, 204 P.3d 880 (internal quotation marks omitted), cert. denied, 215 P.3d 161 (Utah 2009), which we review for correctness. To succeed on an ineffective assistance of counsel claim, Reed must demonstrate that counsel's "performance both falls below an objective standard of reasonableness and prejudices his client." Adams v. State, 2005 UT 62, ¶ 25, 123 P.3d 400 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). Failure to establish either prong of the ineffective assistance of counsel test is fatal to Reed's claim. See State v. Diaz, 2002 UT App 288, ¶ 38, 55 P.3d 1131.

As to the first prong, we agree with Reed that trial counsel performed below an objective standard of reasonableness when she failed to take any action on the pending discovery motions before allowing the case to proceed to trial[1] and did not object or request a continuance when she learned that the State had not subpoenaed Bell to testify. However, as to the second prong, the record is unclear whether, and to what extent, trial counsel's failure to procure any of this evidence actually prejudiced the outcome of the case. See generally State v. Chacon, 962 P.2d 48, 50 (Utah 1998) (stating that a defendant must show prejudice to succeed on a claim for ineffective assistance of counsel).[2] Moreover, Reed's counsel on appeal never "filed a motion for

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[1]Trial counsel filed the motions on December 3, 2007. On December 19, 2007, the day of trial, counsel for both parties met with the trial judge in chambers before the trial began. During that meeting, the parties discussed at length various trial matters, including voir dire and jury instructions. However, Reed's counsel made no mention of the pending discovery motions, except for the following brief exchange, which the trial court initiated:

> THE COURT: I haven't seen anything from you, [Counsel]: I'm sorry.
> COUNSEL: I filed everything all together.
> THE COURT: I haven't seen the voir dire. I haven't seen the proposed instructions. I'm sorry.
> COUNSEL: I filed a bunch of motions all together. And we don't need a motion--
> THE COURT: Motion for transcript?
> COUNSEL: Yes. (Inaudible).

Moreover, even after trial, Reed's counsel did not file a notice to submit for decision on the discovery motions until January 25, 2008--more than a month after the guilty verdict had been rendered in the case.

[2]Reed's brief sheds little light on prejudice beyond stating that trial counsel's deficiencies "cannot be written off as mere harmless error." For example, Reed contends that Bell would have testified at trial that Reed did not have a gun at the incident. However, Bell's written statement--which is not a part of the record on appeal but is included only as an addendum to Reed's brief--makes absolutely no mention of the gun one way or the other. It is therefore unclear how Bell would have testified at trial even had she been called as a witness. Moreover, Reed's brief does not mention that a police officer testified at trial that Bell told him that Reed did not have a gun and that the officer's testimony, therefore, mitigated any possible prejudice stemming from trial counsel's failure to call Bell to testify.

remand under rule 23B of the Utah Rules of Appellate Procedure to develop a record in support of his allegations of ineffective assistance of counsel." See State v. McClellan, 2009 UT 50, ¶ 15, 216 P.3d 956. "Rule 23B is an appropriate procedural tool to remedy any deficiencies in the record caused by counsel's alleged ineffective assistance." State v. King, 2008 UT 54, ¶ 43, 190 P.3d 1283 (internal quotation marks omitted); see also Utah R. App. P. 23B. Where the record is deficient with respect to whether Reed was actually prejudiced by trial counsel's failures--and Reed's appellate counsel took no steps to remedy those deficiencies through a 23B motion--Reed's ineffective assistance of counsel claim fails. See Chacon, 962 P.2d at 50.

Reed also posits that the trial court abused its discretion because it had an affirmative duty under rule 12(e) of the Utah Rules of Criminal Procedure to rule on his pretrial motions before proceeding to trial, see Utah R. Crim. P. 12(e), and failed to do so. Even assuming--without deciding--that the trial court erred in failing to rule on the motions, Reed has failed to demonstrate how that failure prejudiced him. See generally Huish v. Munro, 2008 UT App 283, ¶¶ 7-8, 191 P.3d 1242 (determining that the trial court erred, but stating that "[u]nless an appellant demonstrates that an error is prejudicial, it will be deemed harmless and no appellate relief is available" (citation omitted)). Rather, Reed merely states in his opening brief that he "was handicapped in his defense by not having the requested materials" and speculates that had the trial court granted his motions, the "contradictory" preliminary hearing testimony, the fingerprint evidence, the private investigator, and the 911 dispatch tapes would have yielded a different outcome. Reed attempts to augment his claim of prejudice in his reply brief. However, with the exception of the allegedly contradictory preliminary hearing testimony,[3] Reed continues to speculate as to

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[3]Reed claims that the testimony of one of the eyewitnesses, Orlando Martinez, changed in two respects from the time of the preliminary hearing to the time of trial. First, Martinez testified at the preliminary hearing that he had consumed a six pack of beer on the night of the incident, but he testified at trial that the amount was actually two wine coolers and one beer. Second, Martinez testified at the preliminary hearing that he was standing approximately ten feet away from Reed when Reed pulled the gun, but he stated at trial that he had been closer to six to seven feet away. Reed argues that "the discrepancy between [Martinez's] prior and trial testimony w[as] critical to undermining his credibility before the jury." Reed fails to mention, however, that another eyewitness testified that he was only four feet away from Reed when he saw Reed pull out the gun,

(continued...)

the existence and effect of the purported evidence on the outcome of the case.[4] Because Reed has failed to demonstrate any prejudice from the trial court's failure to act on the motions, his claim fails. See id. ¶ 8.

Affirmed.

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James Z. Davis,
Presiding Judge

WE CONCUR:

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Carolyn B. McHugh,
Associate Presiding Judge

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William A. Thorne Jr., Judge

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[3](...continued)
thus mitigating any possible prejudice stemming from Martinez's allegedly impaired and contradictory testimony regarding visibility on the night of the incident.

[4]For example, Reed states broadly that "[t]he absence of fingerprint evidence can be just as significant as the results of fingerprint evidence, and cross-checking an officer's recollection of a dispatch against the actual tape is a routine method of examining an officer's credibility."